BRIEF FOR APPELLEE/RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NOS. 07-1360 & 07-1441

M2Z NETWORKS, INC.,

Appellant/Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Appellee/Respondents.

ON APPEAL AND PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

In addition to the parties listed in M2Z's brief as participants in the administrative proceeding before the Federal Communications Commission, the following parties participated below:

EchoStar Satellite LLC

Google Inc.

Leap Wireless Communications, Inc.

MetroPCS Communications, Inc.

All parties, intervenors, and amici appearing in this Court are listed in M2Z's brief.

B. Ruling Under Review

Applications for License and Authority to Operate in the 2155-2175 MHz Band, 22 FCC Rcd 16563 (2007) (JA 830).

C. Related Cases

The order on review has not previously been before this Court. Counsel are not aware of any related cases that are pending before this or any other court

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* *Cases and other authorities principally relied upon are marked with asterisks.*

GLOSSARY

AAS	Advanced Antenna System
HDTV	high-definition television
JA	Joint Appendix
kbps	kilobits per second
NPRM	Notice of Proposed Rulemaking
OFDM	Orthogonal Frequency Division Multiplexing
OFDMA	Orthogonal Frequency Division Multiple Access
PCS	personal communications service
SA	Supplemental Appendix
TDD	Time Division Duplexing
WCA	Wireless Communications Association International

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STATEMENT OF ISSUES PRESENTED

Typically, the Federal Communications Commission licenses terrestrial providers of commercial wireless services by first adopting service rules for the relevant spectrum block, then accepting competing applications and allowing those applicants to bid for licenses at auction, and finally awarding licenses to the winning bidders after scrutinizing their qualifications. In 2006, a company called M2Z Networks approached the FCC with a radical proposal to replace the normal licensing framework with one of its own creation. It asked the agency (1) to forbear from applying its core license screening rules – including those that permit it to evaluate the qualifications of prospective licensees and to hear from potential competitors; (2) to set aside its

normal policy of auctioning valuable spectrum; and (3) to hand M2Z a free, exclusive, nationwide license to provide wireless broadband Internet access service in the 2155-2175 MHz band before the agency had even fashioned service rules for this spectrum.

After reviewing extensive comments on M2Z's plan, including comments from other companies with competing proposals for the same spectrum, the Commission concluded that the kind of extreme deviation from standard practice that M2Z advocated was not justified. In the Commission's judgment, an unduly hasty decision to award M2Z a free exclusive nationwide license – without adopting service rules for the spectrum or even considering alternative uses of the spectrum or the possibility of assigning the license(s) by auction – would not serve the public interest. The agency therefore denied M2Z's forbearance petition, dismissed without prejudice all of the pending license applications for the 2155-2175 MHz band, and announced plans to launch a rulemaking to adopt service rules for the band. *Applications for License and Authority to Operate in the 2155-2175 MHz Band,* 22 FCC Rcd 16563 (2007) (JA 830) ("*Order*"). M2Z now asks this Court to stop the Commission from even considering any plan other than M2Z's and to direct the agency to grant M2Z a free license.

M2Z's challenge to the FCC's *Order* presents four issues for review:

(1) whether M2Z has waived a number of its claims by failing to present them to the Commission;

(2) whether the Commission reasonably denied M2Z's forbearance petition on the ground that the requested forbearance would not serve the public interest;

(3) whether the Commission reasonably found that section 7 of the Communications Act did not support M2Z's request for preferential treatment; and

(4) whether, consistent with section 309(j) of the Act, the Commission properly concluded that the public interest would not be served by cutting off consideration of alternative proposals and competing applications for the spectrum sought by M2Z.

JURISDICTION

M2Z filed Case No. 07-1360 pursuant to 47 U.S.C. § 402(b), which grants this Court exclusive jurisdiction over specific categories of FCC orders that involve spectrum licenses. M2Z filed consolidated Case No. 07-1441 pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1), which grant the courts of appeals jurisdiction over FCC orders that are not covered by section 402(b). Both of these cases were timely filed. Therefore, to the extent that M2Z's claims are not barred by section 405 of the Communications Act, 47 U.S.C. § 405, the Court has jurisdiction. *See Mobile Communications Corp. of America v. FCC,* 77 F.3d 1399, 1408 (D.C. Cir. 1996).

STATUTES AND REGULATIONS

Except for 47 U.S.C. § 405, which is set forth in an addendum to this brief, pertinent statutes and regulations are appended to M2Z's brief.

COUNTERSTATEMENT

A. Regulatory Background: The FCC's Standard Procedures For Awarding Spectrum Licenses

The Communications Act establishes a system for licensing the use of radio spectrum. 47 U.S.C. § 301. Under that system, the FCC has the exclusive authority to grant spectrum licenses upon such terms and conditions as it determines to be in the public interest. *Id.* §§ 307(a), 309(a).

"Prior to accepting applications and granting licenses for Wireless Radio Services, the Commission typically establishes service rules addressing technical, operational, regulatory, and licensing issues" such as "whether spectrum should be licensed on an exclusive basis and the processes by which such licenses should be assigned." *Order* ¶ 29 (JA 849). By promulgating service rules before authorizing service, the Commission (among other things) is able to ensure that newly authorized services will put the spectrum to its best use and will not cause harmful interference to existing services in adjacent bands.

In 1993, Congress amended the Communications Act to authorize the FCC to award spectrum licenses through a competitive bidding process. *See* 47 U.S.C. § 309(j). Since then, the Commission has generally found that the public interest is best served by "a licensing framework that permits the filing and acceptance of mutually exclusive applications" and employs "competitive bidding" to determine license winners. *Order* ¶ 10 (JA 836). In the agency's assessment, this type of framework is "most likely to result in the selection of licensees that will value the spectrum the most and put it to its highest and most efficient use." *Ibid.*

B. M2Z's License Application

This case concerns a license applicant that asked the FCC to set aside the rules and procedures that apply to all other wireless providers. Even though the agency had not yet adopted service rules or solicited license applications for the 2155-2175 MHz band, M2Z filed an application on May 5, 2006, "seeking a free, exclusive, nationwide 15-year license in the 2155-2175 MHz band to operate a wireless broadband network." *Order* ¶ 19 (JA 842).

In its application, M2Z urged the FCC to abandon its usual practice of adopting service rules and accepting competing applications. Claiming that its proposed service offered unique public interest benefits, M2Z requested that the Commission grant the company an exclusive

license immediately, without inviting or considering competing applications for the spectrum in question. M2Z also asked to receive the license "free of charge." *Order* ¶ 2 (JA 831). A free license would give M2Z a distinct advantage over most other commercial wireless service providers, which obtained their licenses at spectrum auctions by paying substantial sums of money (in some cases, hundreds of millions or even billions of dollars).[1] In addition, M2Z urged the Commission to dispense with a rulemaking to craft service rules for the spectrum that M2Z sought to use. In lieu of service rules, M2Z proposed certain "public-interest conditions" that the Commission could impose on M2Z's license, including "payment to the U.S. Treasury of a 'voluntary usage fee' of five percent of gross revenues derived from 'Premium Service' offered on a subscription basis." *Order* ¶ 19 (JA 842).

C. M2Z's Forbearance Petition

On September 1, 2006, four months after filing its license application, M2Z filed a petition for forbearance pursuant to section 10(c) of the Communications Act, 47 U.S.C. § 160(c). M2Z requested "that the Commission forbear from applying Sections 1.945(b) and (c) of its rules, and any other rule, provision of the Act, or Commission policy, ... to the extent such rules, statutory provisions, or policies impede the acceptance and grant" of M2Z's license application. M2Z Forbearance Petition at 1 (JA 355).

One of the FCC rules from which M2Z sought forbearance, section 1.945(b), applies only to license applications that are not subject to competitive bidding. Under that rule, no such application "will be granted by the Commission prior to the 31st day following the issuance of a Public Notice of the acceptance for filing of such application or of any substantial amendment

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[1] *See, e.g., Public Notice, Auction of 700 MHz Band Licenses Closes,* 23 FCC Rcd 4572, 4583-4656 (2008); *Public Notice, Auction of Advanced Wireless Services Licenses Closes,* 21 FCC Rcd 10521, 10529-84 (2006).

thereof, unless the application is not subject to [47 U.S.C. § 309(b)]." 47 C.F.R. § 1.945(b). By prohibiting a license grant for 30 days, this rule allows time for potential competitors and other interested parties to file petitions to deny the license application.

The other FCC rule from which M2Z expressly requested forbearance, section 1.945(c), provides that the FCC "will grant" a license application "without a hearing" if the application "is proper upon its face" and if the agency can determine without a hearing that: (1) there are no substantial and material questions of fact; (2) the applicant is legally, technically, financially, and otherwise qualified; and (3) grant of the application would not involve modification, revocation, or non-renewal of any existing license, would not preclude the grant of any mutually exclusive application, and would serve the public interest. 47 C.F.R. § 1.945(c).

In addition, "to the extent necessary," M2Z requested forbearance from section 309(j)(1) of the Communications Act, 47 U.S.C. § 309(j)(1), "which requires the Commission to grant mutually exclusive applications through a system of competitive bidding." M2Z Forbearance Petition at 33-34 (JA 388-89).

M2Z asserted that the forbearance it requested would advance the policy objective embraced by section 7 of the Communications Act: "to encourage the provision of new technologies and services to the public." *See* 47 U.S.C. § 157(a). The company claimed that if it obtained a license, it would "bring an innovative service to the public, using new technologies." M2Z Forbearance Petition at 17 (JA 371). Therefore, according to M2Z, the use of regulatory forbearance to ensure the grant of its license application would be "consistent with Section 7's goal of bringing new services and technologies to the public on an expedited basis." *Ibid.*

D. Proceedings Below

In a public notice issued on January 31, 2007, the FCC's Wireless Telecommunications Bureau announced that it was accepting M2Z's license application for filing. *Public Notice,* 22 FCC Rcd 1955 (2007) (JA 410). Because the Commission had no "established framework of processing rules" to govern M2Z's application, the Bureau accepted the application pursuant to the Commission's "general statutory authority" under section 309 of the Act. *Id.* at 1955 (JA 410). The Bureau emphasized that its action neither "impl[ied] any judgment ... about the merits" of M2Z's application nor "preclude[d] a subsequent dismissal" of the application "as defective under existing rules or under future rules that the Commission may promulgate by notice and comment rulemaking." *Ibid.* The Bureau further noted that "additional applications for spectrum" in the 2155-2175 MHz band "may be filed while the M2Z application is pending." *Id.* at 1956 (JA 411).

M2Z's request for a free, exclusive, nationwide wireless license encountered extensive and intense opposition. A number of parties filed petitions asking the FCC to deny M2Z's application. *Order* ¶ 23 & n.80 (JA 844). They argued that "there are substantial and material questions of fact as to whether granting [M2Z's] application would be in the public interest, would create harmful interference, and would result in an anticompetitive windfall." *Order* ¶ 23 (JA 844-45). They also "urge[d] the Commission to conduct a rulemaking proceeding regarding the service rules" for the 2155-2175 MHz band and to "auction this spectrum to ensure" that it "is put to its best and highest use." *Ibid.* (JA 845).

Meanwhile, six companies applied for licenses to use the same spectrum sought by M2Z. *Order* ¶¶ 21-22 (JA 843-44). Like M2Z, NetfreeUS applied for "a nationwide authorization to use the entire 2155-2175 MHz band subject to conditions." *Order* ¶ 22 (JA 844). NetfreeUS also filed a forbearance petition that was "premised upon many of the same arguments as M2Z's

petition." *Order* ¶ 6 (JA 833). Three of the other license applicants – Commnet, McElroy Electronics, and TowerStream – argued that "if there are mutually exclusive applications, the Commission should assign licenses for [the 2155-2175 MHz] band by competitive bidding." *Order* ¶ 21 (JA 843).

Given the fundamental disagreement over whether a free, exclusive, nationwide license for M2Z would best serve the public interest, several parties also strenuously opposed M2Z's forbearance petition. *See Order* at n.21 (JA 834). AT&T maintained that the petitions to deny and competing applications had identified "serious unresolved questions of fact and matters of policy that need to be addressed before the Commission can make a reasoned judgment on the M2Z application." AT&T Comments in Opposition to Forbearance at 4 (JA 519). In AT&T's view, the forbearance requested by M2Z would "silence all debate," requiring the FCC to "ignore dissenting views and take on faith" M2Z's assertions "that its proposal will serve the public interest." *Ibid.*

Similarly, CTIA questioned the wisdom of forbearing from 47 C.F.R. § 1.945(c), which requires a license applicant to demonstrate (among other things) that there are "no substantial and material questions of fact," that the applicant "is legally, technically, financially, and otherwise qualified," and that "grant of the application would serve the public interest." CTIA Opposition to Forbearance at 4 n.14 (JA 561) (quoting 47 C.F.R. § 1.945(c)). CTIA contended that M2Z "offered no analysis to demonstrate why forbearing from these [requirements] is in the public interest." *Id.* at 4 (JA 561).

Likewise, the Wireless Communications Association International (WCA) asserted that M2Z had failed to show "why the Commission should throw its rules and policies aside to facilitate an unchallenged grant to M2Z of an exclusive nationwide license for the 2155-2175

MHz band." WCA Opposition to Forbearance at 9 (JA 574). In WCA's view, "the proper forum" for evaluating M2Z's proposal was "a rulemaking proceeding, where all of the relevant issues ... and interested parties" could receive "a full and fair hearing." *Ibid.*

E. The Order On Review

In an order released on August 31, 2007, the Commission denied the forbearance petitions filed by M2Z and NetfreeUS. *Order* ¶¶ 8-18 (JA 834-42). It determined that the public interest would not be served by forbearing from 47 C.F.R. §§ 1.945(b) and 1.945(c). These rules were largely designed "to ensure that the Commission has a sufficient basis upon which to determine whether the grant of a given license application will best serve the public interest." *Order* ¶ 9 (JA 835). In the Commission's judgment, neither M2Z nor NetfreeUS had justified their proposals to bypass these rules. While forbearance from the rules might "result in the issuance of a license sooner than conforming to established processes," the Commission found that "such licensing would come at the expense of establishing a complete record that enables the Commission to consider all of the relevant factors in determining whether to grant a license." *Ibid.* "In short," the Commission concluded, "a potentially speedy but ill-considered licensing process does not serve the public interest." *Ibid.*

The Commission also found that awarding a free license to M2Z or NetfreeUS without even considering the competitive bidding provisions of section 309(j) would be "inconsistent with the public interest." *Order* ¶ 10 (JA 836). The agency observed that "the grant of any of the pending applications, by cutting off consideration of a competitive bidding licensing framework and precluding consideration of other potential applicants for this spectrum, would appear to compromise the development of competitive market conditions." *Order* at n.34 (JA 836). In past proceedings, the Commission had generally concluded that the use of auctions to

award licenses would "most likely ... result in the selection of licensees that will value the spectrum the most and put it to its highest and most efficient use." *Order* ¶ 10 (JA 836). In this proceeding, the Commission found no convincing evidence that the service proposed by M2Z or NetfreeUS would "better serve the public interest than the spectrum use that would be made by" the highest bidder for the spectrum at an auction. *Order* ¶ 11 (JA 837).

In light of these considerations, the Commission declined to provide M2Z or NetfreeUS "with a route to licensing that ... precludes even the possibility of an auction and would simply give either company spectrum for free." *Order* ¶ 11 (JA 837). The agency left open the possibility that it might conclude, "after compiling a more complete record through the APA notice-and-comment rulemaking process, that the public interest would be better served by employing an alternative licensing framework" that did not involve competitive bidding. *Ibid.* In the Commission's judgment, however, the record compiled in this proceeding did "not justify such a conclusion." *Ibid.*

In the course of denying M2Z's forbearance petition, the Commission rejected the company's claim that section 7 of the Act "creates a presumption in favor of granting" M2Z's license application. *Order* ¶ 12 (JA 837). Section 7 requires the Commission to "determine whether any new technology or service proposed in a petition or application is in the public interest within one year after such petition or application is filed." 47 U.S.C. § 157(b). It also provides: "Any person or party (other than the Commission) who opposes a new technology or service proposed to be permitted under this Act shall have the burden to demonstrate that such proposal is inconsistent with the public interest." 47 U.S.C. § 157(a). In this proceeding, the FCC found that section 7 did not apply to M2Z's application because M2Z had not proposed any new service or technology. *Order* ¶ 13 (JA 838).

The Commission noted that the service M2Z proposed to provide – wireless broadband Internet access service – "currently is being offered by other service providers to consumers using both licensed and unlicensed spectrum." *Order* ¶ 13 (JA 838). The Commission also found that "the transmission speeds proposed by M2Z are unremarkable compared to other broadband services currently being deployed." *Order* ¶ 14 (JA 839). Likewise, the Commission found nothing new about the Time Division Duplexing (TDD), Orthogonal Frequency Division Multiple Access (OFDMA), and Advanced Antenna System (AAS) technologies that M2Z proposed to use. *See Order* ¶ 2 (JA 831). The agency observed that TDD, OFDMA, and AAS "are all proven technologies that have been deployed in other bands." *Order* ¶ 13 (JA 838). For all of these reasons, the Commission concluded that M2Z had not proposed any "new technology or service" within the meaning of section 7. *Ibid.*

In any event, even assuming that M2Z was proposing a "new" service or technology, the Commission determined that granting M2Z's application would not serve the public interest or the goals of section 7. Given the "relatively slow" transmission speed of M2Z's proposed service, *Order* ¶ 14 (JA 838), the Commission saw no good reason to grant M2Z an exclusive license without first considering the competing (and potentially superior) proposals of other applicants for the same spectrum. *Order* ¶ 16 (JA 841). The agency further observed that M2Z's "construction benchmarks" were "misleading as far as the actual extent of their coverage," and that "M2Z's build-out proposal ... falls short of the build out standards that [the Commission has] imposed in other contexts ... to spur the deployment of advanced services to rural and underserved populations." *Order* ¶ 15 (JA 839-40). These considerations convinced the Commission that awarding an exclusive nationwide license to M2Z would neither promote

the rapid deployment of new services (the primary objective of section 7) nor serve the public interest.

The Commission went on to dismiss all of the pending license applications, including those filed by M2Z and NetfreeUS, without prejudice. It decided that "processing the applications ... without considering and adopting service and licensing rules would be ... contrary to the public interest." *Order* ¶ 30 (JA 850). The Commission explained that it "typically establishes service rules addressing technical, operational, regulatory, and licensing issues" before it accepts license applications for wireless services. *Order* ¶ 29 (JA 849). It saw no reason to depart from that routine practice here.

The Commission rejected M2Z's call for "an *ad hoc* adjudicatory proceeding" to address the applications that had already been filed. *Order* ¶ 29 (JA 849). Instead, the Commission found that "a rulemaking proceeding" that afforded "all interested parties the opportunity to comment" on such important issues as service parameters and licensing procedures would be "the most effective, fairest," and most "efficient way to arrive at a result that will best serve the public interest." *Ibid.* Consequently, the Commission announced plans "to issue a Notice of Proposed Rule Making to seek comment on service rules" for the 2155-2175 MHz band. *Order* ¶ 28 (JA 849). In view of those plans, the agency dismissed all pending applications, including M2Z's application. *Order* ¶ 30 (JA 850). It said that if parties believed that "any of the proposals or conditions set forth in the [dismissed] applications should be considered as service rules" for the spectrum in question, they could "propose such rules in response to the Notice of Proposed Rule Making." *Ibid.*

F. Subsequent Developments

Less than a month after it issued the *Order*, the FCC made good on its promise and released a notice of proposed rulemaking regarding service rules for the 2155-2175 MHz band. *Service Rules for Advanced Wireless Services in the 2155-2175 MHz Band,* 22 FCC 17035 (2007) (SA 1) ("*NPRM*"). Among other things, the Commission requested comment on M2Z's service proposal. *NPRM* ¶¶ 3, 86-91 (SA 3-4, 42-45). Specifically, it sought comment on M2Z's proposal that the Commission license this spectrum "in a manner that would avoid the filing of mutually exclusive applications, and accordingly allow licensing on a non-auctioned basis." *NPRM* ¶ 3 (SA 4). The Commission also solicited comment on a wide range of other complex issues, including different technological approaches to the spectrum (*NPRM* ¶¶ 11-23 (SA 9-16)), the size of the spectrum blocks and geographic areas that would be encompassed by spectrum licenses (*NPRM* ¶¶ 24-38 (SA 16-22)), and the potential for harmful interference to incumbent services in adjacent bands (*NPRM* ¶¶ 49-71 (SA 26-36)).

Numerous parties – including M2Z – filed comments in response to the *NPRM*. The Commission has not yet adopted rules governing use of the spectrum. Underscoring the complexity of the issues involved in the rulemaking, including how large the band should be and commenters' concerns about interference with adjacent bands, the Commission recently issued a further notice of proposed rulemaking to seek additional comment on proposed service rules. *Service Rules for Advanced Wireless Services in the 2155-2175 MHz Band,* FCC 08-158 (released June 20, 2008) (SA 148).

SUMMARY OF ARGUMENT

In 2006, M2Z approached the FCC with a novel proposition. Even though the Commission had not yet adopted service rules governing the 2155-2175 MHz band, M2Z asked

the agency for a free, exclusive, nationwide license to use that spectrum to provide wireless broadband service. Rather than give the FCC the opportunity to develop rules regulating this service, M2Z proposed to provide the service on terms and conditions that the company itself prescribed in its license application. In addition, to remove any obstacles to the immediate grant of its application, M2Z urged the Commission to abandon its well-established practice of adopting service rules, accepting competing applications under those rules, allowing qualified applicants to bid for spectrum licenses at an auction, and examining the qualifications of the winning applicants. Convinced that its proposal was self-evidently superior to any other possible use of this spectrum (and that M2Z was self-evidently superior to any other company willing to provide its proposed service), M2Z sought to circumvent the usual licensing process and to foreclose others from competing for the spectrum.

In the Commission's considered judgment, the record in this proceeding did not justify such an extreme departure from the agency's standard licensing procedures. Those procedures were reasonably designed to promote the public interest by selecting qualified licensees that would put the spectrum to its best and most efficient use. The Commission saw no reason to deviate from those procedures unless M2Z could show that its alternative proposal would produce a clearly superior use of the spectrum. M2Z made no such showing here. Among other things, the transmission speed of its proposed service was slow compared to existing broadband services; and its proposed construction schedule did not ensure prompt deployment of its service throughout the nation. Accordingly, in the *Order*, the FCC reasonably rejected M2Z's proposal.

M2Z challenges the *Order* on several grounds. None of its claims has merit.

I. Many of M2Z's arguments – including all of its attacks on the FCC's denial of the company's forbearance petition – were not presented to the Commission before M2Z brought

this lawsuit. Therefore, pursuant to 47 U.S.C. § 405, the Court lacks jurisdiction to consider those claims.

II. Even if M2Z had preserved its claims, they should be rejected. Before the FCC can grant a forbearance petition under section 10, it must find that the requested forbearance "is consistent with the public interest." 47 U.S.C. § 160(a)(3). In this case, the Commission reasonably found that the forbearance sought by M2Z would not serve the public interest. Therefore, the Commission properly denied M2Z's forbearance petition.

The procedural FCC rules from which M2Z requested forbearance are essential to compiling a sufficient record for the agency to assess whether M2Z's license application should be granted. Among other things, those rules ensure that competitors have a fair opportunity to be heard, that a license applicant is qualified, and that there is no material issue of fact concerning whether its application is in the public interest. The Commission sensibly concluded that forbearance from those procedural rules could produce a rash and ill-informed decision on the merits of M2Z's application.

The Commission also rightly rejected M2Z's request for forbearance from the competitive bidding requirements of section 309(j). It saw no good reason to grant an exclusive license to M2Z without first considering in a rulemaking proceeding whether an auction would be a more appropriate means of licensing the spectrum. The Commission reasonably concluded that "the benefits of considering such a licensing regime ... outweigh the value of any purported public interest benefits of providing M2Z ... with a route to licensing that ... precludes even the possibility of an auction and would simply give [M2Z] spectrum for free." *Order* ¶ 11 (JA 837).

In light of the Commission's express finding that the forbearance sought by M2Z would not serve the public interest, M2Z cannot seriously claim that the Commission failed to address

the merits of M2Z's forbearance petition. Nor can the company plausibly contend that the agency failed to consider how forbearance would affect competitive market conditions. The Commission found that the forbearance requested by M2Z "would appear to compromise the development of competitive market conditions" by "precluding consideration of other potential applicants for this spectrum." *Order* at n.34 (JA 836). The agency thus satisfied its statutory duty to "consider whether forbearance ... will promote competitive market conditions." 47 U.S.C. § 160(b).

III. The Commission reasonably rejected M2Z's claim that section 7, 47 U.S.C. § 157, required it to grant M2Z's application. That provision requires the agency only to consider whether a proposed "new technology or service" is in the public interest. It has no bearing on the agency's consideration of any particular company's application to provide such a service. Even assuming that section 7 applied, the Commission reasonably found that granting an exclusive nationwide license to M2Z would not advance the public interest. Given the relatively slow speed of M2Z's proposed service and the sluggish pace of its proposed construction schedule, the Commission concluded that granting an exclusive license to M2Z would impede the realization of the goal espoused by section 7: the rapid deployment of advanced technologies to the public.

In any event, the service that M2Z proposed to provide – wireless broadband Internet access service – was not "new." That type of service "currently is being offered by other service providers to consumers using both licensed and unlicensed spectrum." *Order* ¶ 13 (JA 838). Similarly, M2Z's application did not propose any "new" technology. The technologies that M2Z proposed to use "are all proven technologies" that have previously been deployed. *Ibid.*

IV. On the basis of the record in this proceeding, the Commission reasonably found no public interest justification for avoiding mutual exclusivity, foreclosing the possibility of an auction, and simply handing M2Z the license it sought. That determination was amply justified and fully consistent with section 309(j)(6)(E). M2Z produced no convincing evidence that its proposed service would "better serve the public interest than the spectrum use that would be made by" the winning bidders for licenses at an auction. *Order* ¶ 11 (JA 837).

STANDARD OF REVIEW

Insofar as M2Z challenges the FCC's reading of the Communications Act, judicial review of the agency's statutory interpretation is governed by *Chevron USA v. Natural Resources Defense Council,* 467 U.S. 837 (1984). Under *Chevron,* if "Congress has directly spoken to the precise question at issue," the Court "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. But "if the statute is silent or ambiguous with respect to the specific issue, the question for the [Court] is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. If the implementing agency's reading of an ambiguous statute is reasonable, *Chevron* requires this Court "to accept the agency's construction of the statute, even if the agency's reading differs from what the [Court] believes is the best statutory interpretation." *National Cable & Telecommunications Association v. Brand X Internet Services,* 545 U.S. 967, 980 (2005) ("*Brand X*").

The FCC's *Order* in this case must be upheld unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This standard of review is "highly deferential." *Cellco Partnership v. FCC,* 357 F.3d 88, 93 (D.C. Cir. 2004) (internal quotations omitted). The Court must "presume the validity of the Commission's action," and it may "not intervene unless the Commission failed to consider relevant factors or

made a manifest error in judgment." *Mobile Relay Associates v. FCC,* 457 F.3d 1, 8 (D.C. Cir. 2006 (internal quotations omitted. In particular, "the Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference." *FCC v. WNCN Listeners Guild,* 450 U.S. 582, 596 (1981).

ARGUMENT

I. SECTION 405 OF THE COMMUNICATIONS ACT BARS JUDICIAL REVIEW OF MANY OF M2Z'S CLAIMS.

A number of the claims that M2Z raises in its brief were never presented to the Commission. In particular, the agency never received an opportunity to address M2Z's arguments that the FCC: (1) failed to address the merits of M2Z's forbearance petition (Br. 29-32); (2) did not adequately consider whether forbearance would promote competitive market conditions (Br. 23-29); (3) interpreted the phrase "new service" in section 7 in a manner that was unreasonable and inconsistent with agency precedent (Br. 35-42); (4) confused OFDMA with another technology and ignored M2Z's claim that the combination of its technologies was "new" (Br. 42-46); (5) misread the phrase "other than the Commission" in section 7(b) (Br. 47-49); (6) provided an insufficient explanation for its conclusion that M2Z's opponents carried their burden under section 7(a) (Br. 49 n.40); and (7) ignored the "public interest" evidence submitted by M2Z and its supporters (Br. 53-55). As a result, pursuant to section 405 of the Communications Act, the Court lacks jurisdiction to consider any of these claims. 47 U.S.C. § 405; *Sprint Nextel Corp. v. FCC,* 524 F.3d 253, 256-57 (D.C. Cir. 2008); *Qwest Corp. v. FCC,* 482 F.3d 471, 474-76 (D.C. Cir. 2007).

M2Z cannot evade the requirements of section 405 merely by asserting that the issues it failed to present to the FCC did not come to light until the Commission issued the *Order.* "[E]ven when a petitioner has no reason to raise an argument until the FCC issues an order that

makes the issue relevant, the petitioner must file a petition for reconsideration with the Commission before it may seek judicial review." *Qwest,* 482 F.3d at 474 (quoting *In re Core Communications, Inc.,* 455 F.3d 267, 276-77 (D.C. Cir. 2006)). *See also Freeman Engineering Associates v. FCC,* 103 F.3d 169, 182 (D.C. Cir. 1997) ("If a party to an FCC proceeding believes that the Commission has failed to address certain record evidence, § 405 requires that the party bring the matter to the attention of the agency before proceeding to court."); *Coalition for Noncommercial Media v. FCC,* 249 F.3d 1005, 1008-09 (D.C. Cir. 2001) (if a party thinks that the FCC has deviated from past practice without explanation, it must raise that issue with the Commission before coming to court). Thus, M2Z has no good excuse for failing to comply with section 405. Indeed, NetfreeUS, another party seeking relief similar to M2Z, has filed a petition for FCC reconsideration of the *Order*, thus giving the Commission the required opportunity to address its challenges to the *Order*'s reasoning.

As we explain below, the claims that M2Z failed to present to the FCC lack merit in any event. But the Court need not – and should not – reach the merits of those claims because M2Z has waived them.

II. THE COMMISSION REASONABLY DECIDED THAT THE FORBEARANCE REQUESTED BY M2Z WOULD NOT SERVE THE PUBLIC INTEREST.

In order to obtain forbearance from a statutory provision or regulation, a petitioner must demonstrate, among other things, that "forbearance from applying *such provision or regulation* is consistent with the public interest." 47 U.S.C. § 160(a)(3) (emphasis added); *see also Cellular Telecommunications & Internet Association v. FCC,* 330 F.3d 502, 509 (D.C. Cir. 2003). In this case, the Commission reasonably found that the forbearance sought by M2Z from two FCC procedural regulations governing evaluation of license applications and from a statutory

provision governing auctions would not serve the public interest. *Order* ¶¶ 9-11 (JA 835-37). Consequently, the Commission denied M2Z's forbearance petition. The Court should uphold that reasonable decision.

Radio spectrum is a very limited public resource. With that consideration in mind, the federal government does not typically accept the first workable proposal for the use of a band without considering alternatives. Instead, the government's consistent policy has been to try to determine first the best use of the spectrum through rulemaking and then the best user through competitive processes. As this Court long ago explained, "comparative consideration by the Commission and competition between ... applicants is the process most likely to serve the public." *New South Media Corp. v. FCC,* 685 F.2d 708, 715 (D.C. Cir. 1982) (quoting *Community Broadcasting Co. v. FCC,* 274 F.2d 753, 759 (D.C. Cir. 1960)). In seeking forbearance, therefore, M2Z bore the burden of demonstrating that its application was not merely in the public interest, but so much better than any other possible proposal that the Commission should short-circuit its longstanding procedures for licensing spectrum use. As explained below, the Commission reasonably found that M2Z failed to carry that burden.

M2Z asserts that the agency failed to address the merits of its forbearance petition. Br. 29-32. It also contends that the Commission did not adequately "consider" whether the forbearance sought by M2Z would "promote competitive market conditions." Br. 23-29 (quoting 47 U.S.C. § 160(b)). Neither argument has merit.

A. The Commission Properly Denied M2Z's Forbearance Petition On The Merits.

M2Z is simply wrong when it asserts that "the Commission did not actually address [M2Z's] forbearance request on the merits." Br. 29. M2Z appears to believe that all it needed to demonstrate was that the service it hoped to provide would have public interest benefits, but that

is not the inquiry mandated by the forbearance statute. Instead, under section 10(a)(3), M2Z was required to show that it would be in the public interest to free M2Z from application of the particular regulations and statutory provisions it identified in its petition. *Order* ¶¶ 9-11 (JA 835-37). That is the showing M2Z clearly failed to make. Indeed, in its argument to the Court, M2Z does not even mention the specific regulatory and statutory provisions from which it sought forbearance, let alone explain why forbearing from those specific provisions would have been in the public interest. *See* Br. 21-33.

The Commission sensibly rejected M2Z's request that the agency forbear from applying 47 C.F.R. §§ 1.945(b) and 1.945(c) to M2Z's license application. Section 1.945(b) bars the grant of a license application until 31 days after the Commission has announced its acceptance of the application for filing. And under section 1.945(c), the Commission must make findings on various factors – including an applicant's qualifications – before granting a license without a hearing. The purpose of those FCC rules is "to ensure that the Commission has a sufficient basis" for evaluating "whether the grant of a given license application will best serve the public interest." *Order* ¶ 9 (JA 835). Section 1.945(b) provides interested parties with "opportunities for challenging an application" so that the Commission can "develop a full public record upon which to evaluate the application." *Ibid.* And section 1.945(c) "ensures that the Commission considers such relevant factors as the applicant's technical, financial, and other qualifications." *Ibid.* The Commission saw no good reason to refrain from applying those basic procedural rules to M2Z's application.

While the truncated proceeding desired by M2Z "may result in the issuance of a license sooner than … established processes" would permit, the Commission found that a rush to judgment on M2Z's application "would come at the expense of establishing a complete record

that enables the Commission to consider all of the relevant factors in determining whether to grant a license." *Order* ¶ 9 (JA 835). In the FCC's judgment, it made no sense to grant M2Z's application without first gathering all the information necessary to make an informed licensing decision. In particular, the Commission was rightly concerned that the abbreviated process sought by M2Z would not afford the agency a full opportunity to consider and address the numerous issues raised by the "various filings made in this proceeding that oppose M2Z's [application] ... or propose competing uses of the [2155-2175 MHz] band." *Ibid.* (JA 835-36). The Commission also found no good reason to forbear from considering the critical licensing factors enumerated in section 1.945(c), including "the applicant's technical, financial, and other qualifications." *Order* ¶ 9 (JA 835). "In short," the Commission concluded, "a potentially speedy but ill-considered licensing process does not serve the public interest." *Ibid.*

M2Z's brief offers virtually no argument that the Commission erred in determining that forbearance from these core license processing rules was not in the public interest. Why was it in the public interest to permit M2Z's license application to be granted before "the 31st day following the issuance of [the] Public Notice of [its] acceptance for filing," 47 C.F.R. § 1.945(b)? And given that the 31st day passed in March 2007, what possible benefit could M2Z have obtained from forbearance from this regulation after that time? M2Z's brief does not attempt to answer either question. Likewise, why was it in the public interest for the Commission to award M2Z a license without first determining that "[t]here [were] no substantial and material questions of fact" about its proposal or without evaluating whether M2Z was "legally, technically, financially, and otherwise qualified," 47 C.F.R. § 1.945(c)(1), (2)? Again, M2Z stands mute in the face of these critical questions that go to the heart of the forbearance relief it sought from the Commission.

The FCC also reasonably determined that it would be "inconsistent with the public interest" to grant M2Z's request for forbearance from the competitive bidding requirements of 47 U.S.C. § 309(j) or its sweeping and vague request for forbearance from any statute, rule, or policy that would "impede" the immediate grant of M2Z's license application. *Order* ¶ 10 (JA 836). Essentially, M2Z asked the Commission to give the company a free license without even considering other possible uses of the spectrum or the possibility of assigning licenses by auction. In the past, however, the Commission had generally found that the use of auctions to award wireless licenses "best serves the public interest because it is … most likely to result in the selection of licensees that will value the spectrum the most and put it to its highest and most efficient use." *Ibid.* The record in this proceeding contained nothing to persuade the Commission that M2Z's proposed service would "better serve the public interest than the spectrum use that would be made by" the highest bidder for this spectrum at an auction. *Order* ¶ 11 (JA 837).

Taking these considerations into account, the Commission could not justify awarding M2Z a free license without at least considering (after compiling a more complete record through notice-and-comment rulemaking) whether to allow competing applicants for the spectrum to participate in an auction. Even assuming that denial of M2Z's forbearance request might delay the initiation of service in the 2155-2175 MHz band, the Commission concluded that "the benefits of considering" whether to hold an auction "outweigh the value of any purported public interest benefits of providing M2Z … with a route to licensing that … precludes even the possibility of an auction and would simply give [M2Z] spectrum for free." *Order* ¶ 11 (JA 837). And even assuming that the basic contours of M2Z's proposed service were in the public interest, it would be reasonable to determine that those contours should be codified into service

rules and that an auction should be held among those companies wishing to provide service in compliance with those rules (rather than just giving M2Z a free exclusive license). Accordingly, the Commission decided that granting M2Z's request for forbearance from section 309(j) would not serve the public interest.

In light of the Commission's express finding that M2Z's forbearance petition failed to satisfy the public interest requirement of section 10(a)(3), M2Z cannot plausibly argue that the FCC "decided not to decide" that issue. Br. 30. Nor can M2Z fairly compare this case to *AT&T Inc. v. FCC,* 452 F.3d 830 (D.C. Cir. 2006). In that case, when the FCC denied a forbearance petition filed by SBC, it "pointed to nothing in *SBC's* forbearance request that flunked section 10(a)(3)'s public interest requirement. Instead, the Commission denied SBC's petition on the ground that *all* conditional forbearance requests are, as a procedural matter, contrary to the public interest and thus require no substantive consideration." *Id.* at 835. In this proceeding, by contrast, the Commission denied M2Z's forbearance petition on its own merits. Unlike the approach it took in *AT&T,* the Commission here specifically found that the forbearance requested by M2Z would not promote the public interest.

This case is also distinguishable from *AT&T Corp. v. FCC,* 236 F.3d 729 (D.C. Cir. 2001), another case on which M2Z relies (Br. 32). The Court there held that the Commission "has no authority to sweep ... away" section 10 by relying on "the availability of ... an alternative route for seeking" regulatory relief. *AT&T Corp.,* 236 F.3d at 738. In that case, the Commission had suggested that it could deny a forbearance petition *without applying the standards of section 10* on the ground that the requested relief could be obtained through a different regulatory mechanism. Here, however, the Commission made no attempt to "sweep away" section 10. It properly applied the standards of section 10 to M2Z's petition; and it

reasonably determined that the petition failed to satisfy the public interest requirement of section 10(a)(3). The Commission thus discharged its "responsibility to fully consider" M2Z's petition "under § 10." *See ibid.*

Finally, M2Z takes the Commission to task for not crediting the "massive record evidence explaining why granting the forbearance petition was in the public interest" (Br. 29), *i.e.,* the petitions signed by "[m]ore than 50,000 individuals" and the letters from "[m]ore than a dozen U.S. Senators and Members of Congress," "hundreds of state and local representatives," and various "associations" (Br. 14-15). While the Commission appreciated hearing from M2Z's supporters, agency decision-making is not "a democratic process by which the majority of commenters prevail by sheer weight of numbers." *Natural Resources Defense Council v. EPA,* 822 F.2d 104, 122 n.17 (D.C. Cir. 1987). M2Z succeeded in demonstrating that it could solicit large numbers of supporting letters, but it failed to show that the Commission was required to grant it an exclusive license without even establishing service rules, assessing alternative proposals, or considering whether to provide other companies with a fair opportunity to compete for this valuable piece of spectrum.

B. The Commission Adequately Considered Whether The Requested Forbearance Would Promote Competitive Market Conditions.

Section 10(b) requires the FCC, as part of its public interest analysis of a forbearance petition, to "consider whether" the requested forbearance "will promote competitive market conditions." 47 U.S.C. § 160(b). "When a statute requires agencies to 'consider' particular factors, it 'imposes upon agencies duties that are essentially procedural ... [T]he only role for a court is to insure that the agency has considered the [factor].'" *Getty v. FSLIC,* 805 F.2d 1050, 1055 (D.C. Cir. 1986) (quoting *Strycker's Bay Neighborhood Council, Inc. v. Karlen,* 444 U.S.

223, 227 (1980)). In this case, in accordance with section 10(b), the Commission plainly considered whether the forbearance sought by M2Z would "promote competitive market conditions." Specifically, the Commission observed that the use of forbearance to grant M2Z's application, "by cutting off consideration of a competitive bidding licensing framework and precluding consideration of other potential applicants for this spectrum, would appear to compromise the development of competitive market conditions." *Order* at n.34 (JA 836). Thus, there is no basis for M2Z's claim (Br. 23-26) that the FCC failed to comply with section 10(b).

M2Z asserts that the Commission violated section 10(b) by making only a "conclusory" and "terse" observation about competitive market conditions. Br. 25. But the statute does not require a detailed analysis of competition. Section 10(b) simply directs the Commission to "consider" whether forbearance from enforcing certain rules or statutes "will promote competitive market conditions." 47 U.S.C. § 160(b). That means "only that [the FCC] must reach an express and considered conclusion about the bearing of [that] factor, but is not required to give any specific weight to it." *See Omnipoint Corp. v. FCC,* 78 F.3d 620, 634 (D.C. Cir. 1996); *Time Warner Entertainment Co. v. FCC,* 56 F.3d 151, 175 (D.C. Cir. 1995). The Commission here reached an express and considered conclusion that the forbearance requested by M2Z "would appear to compromise the development of competitive market conditions." *Order* at n.34 (JA 836). Section 10(b) requires nothing more.[2]

In any event, even if the FCC had found that forbearance in this case would promote competition, section 10 would not mandate a finding that forbearance is in the public interest. The statute provides only that a determination that forbearance will promote competition "*may* be the basis for a Commission finding that forbearance is in the public interest." 47 U.S.C. §

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[2] *Cf. EarthLink, Inc. v. FCC,* 462 F.3d 1, 8 (D.C. Cir. 2006) (rejecting the argument that section 10 requires a "painstaking analysis of market conditions").

160(b) (emphasis added). In light of the Commission's findings that M2Z's request that it forbear from core license processing rules (such as the one allowing the agency to evaluate M2Z's qualifications as a licensee) was decidedly not in the public interest, there is little question that the Commission would have denied forbearance relief even had it found that M2Z's proposal could promote "competitive market conditions."

M2Z tries to equate the FCC's conduct in this case with the statutory violation that this Court found in *Getty*. Br. 25-26. But that case involved a different statute and a different set of facts. In *Getty,* the Court ruled that the FSLIC had violated a statutory directive to "consider" bidders' priorities when authorizing the acquisition of a failing thrift institution. *Getty,* 805 F.2d at 1054-57. The administrative orders at issue there merely stated – without elaboration – that the FSLIC had considered bidders' priorities. Those orders contained no discussion of "which bidders had which priorities" and no explanation of how those priorities "influenced [the] FSLIC's decision." *Id.* at 1057. The orders' silence on these issues led the Court to conclude that the FSLIC "in fact did not consider the priorities." *Ibid.* "Stating that a factor was considered," the Court said, "is not a substitute for considering it." *Id.* at 1055.

This case is clearly distinguishable from *Getty*. The FCC here – unlike the FSLIC in *Getty* – reached an express conclusion about the factor that it was statutorily obliged to consider. M2Z may disagree with that conclusion; but in light of the agency's express finding that the forbearance requested by M2Z "would appear to compromise the development of competitive market conditions" by cutting off consideration of competing proposals, *Order* at n.34 (JA 836), M2Z cannot seriously claim that the Commission failed to consider the factor specified by section 10(b).

M2Z also contends that the Commission's assessment of competitive market conditions is flawed. It maintains that the agency ignored evidence that M2Z's proposed service would promote competition. Br. 26. In addition, M2Z argues that the Commission's market analysis deviated from FCC precedent without explanation by focusing on "the market among applicants for access to spectrum, as opposed to the consumer market for communications services." Br. 27. These assertions lack merit.

M2Z claims that the Commission failed to consider "extensive evidence ... showing that M2Z's service would promote competitive market conditions." Br. 26. The "evidence" cited by M2Z made the unremarkable observation that M2Z's entry into the broadband market would increase competition. That evidence, however, did not address the question posed by section 10(b): How would forbearance from the particular regulatory and statutory provisions identified by M2Z affect competition? To answer that question, the Commission had to consider whether it could best promote competitive market conditions by forbearing from standard licensing procedures (and granting an exclusive nationwide license to M2Z without, among other things, requiring any finding that the company was qualified to hold a license) or by adhering to standard procedures (and allowing other applicants to compete for spectrum licenses).

Weighing these alternatives, the Commission reasonably concluded that M2Z's proposal – which would have disqualified all other applicants – would not likely promote competition as effectively as the Commission's conventional licensing process.[3] Contrary to M2Z's assertion (Br. 27), the Commission's assessment of the competitive impact of forbearance directly pertained to "the consumer market for communications services." The Commission had reason to believe that M2Z might not put the spectrum to its most efficient use. M2Z proposed to offer

[3] M2Z suggests that the FCC had unreviewable discretion to refuse to accept any other applications for filing (Br. 16-17), but cites no supporting authority.

broadband service at "relatively slow" transmission speeds compared to existing services, *Order* ¶ 14 (JA 838); and M2Z's proposed construction schedule lagged well behind the build-out standards that the Commission had imposed on other services, *Order* ¶ 15 (JA 840). The Commission was justifiably concerned that turning away other applicants for the spectrum could keep more efficient competitors out of the market, depriving consumers of the full benefits of competition. Thus, to the extent that the requested forbearance "compromis[ed] the development of competitive market conditions," it would have "adverse effects on ... the protection of consumers." *Order* at n.34 (JA 836); *see also* 47 U.S.C. § 160(a)(2).

In sum, the FCC fully considered the relevant factors under section 10 and properly denied M2Z's forbearance petition on the merits. Accordingly, the Court should affirm the agency's denial of M2Z's forbearance request.[4]

III. THE COMMISSION CORRECTLY CONCLUDED THAT SECTION 7 DID NOT SUPPORT M2Z'S REQUEST FOR PREFERENTIAL TREATMENT.

In its forbearance petition, M2Z contended that because its license application "proposes a new technology and service," section 7 of the Act "creates a presumption in favor of granting [the] application." *Order* ¶ 12 (JA 837). The Commission rightly rejected that assertion for

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[4] In the unlikely event that the Court finds any of M2Z's forbearance arguments persuasive, it should decline the company's invitation to rule that the forbearance petition has been "deemed granted" as a matter of law. *See* Br. 28-29 (citing 47 U.S.C. § 160(c)). Where (as here) Congress has taken the extraordinary step of providing a "deemed grant" remedy for agency inaction, this Court has refused "to extend Congress's remedy for delay into a similarly radical remedy for error." *Ethyl Corp. v. Browner,* 989 F.2d 522, 524 (D.C. Cir. 1993). In previous cases where the Court held that the FCC erroneously denied a forbearance petition, the Court did not order the Commission to grant the petition; it simply remanded the matter to the agency for further consideration. *See, e.g., AT&T Inc.,* 452 F.3d at 838-39; *Verizon Telephone Cos. v. FCC,* 374 F.3d 1229, 1235 (D.C. Cir. 2004); *AT&T Corp.,* 236 F.3d at 738. In any event, M2Z is wrong to suggest (Br. 33) that a grant of forbearance here will inexorably result in a grant of M2Z's license application. *See Order* at n.30 (JA 835) (a grant of forbearance here "would not result in an automatic grant of the license").

three reasons. First, the claim rests on a false premise; nothing in section 7 creates a presumption in favor of any particular *application* to provide a service, even a "new" one. Second, the Commission determined that even if section 7 did apply, M2Z's proposal for an exclusive nationwide license was inconsistent with the public interest. *Order* ¶¶ 15-16 (JA 839-41). Finally, the Commission properly found that section 7 did not apply here because M2Z's application did not propose any new service or technology. *Order* ¶¶ 13-14 (JA 838-39).

A. Section 7 Does Not Create A Presumption In Favor Of Granting Any Particular Application.

M2Z claims that section 7 entitled it "to a finding that *its application* is in the public interest," which "in turn entitles M2Z to the license it seeks." Br. 34 (emphasis added). That contention rests on a fundamental misreading of the statute. Section 7 directs the Commission to "determine whether *any new technology or service* proposed in a petition or application is in the public interest." 47 U.S.C. § 157(b) (emphasis added). By its plain terms, that provision concerns only whether a proposed new technology or service is in the public interest. It does not address the very different question posed by M2Z: whether granting a *particular application* to provide such a technology or service is in the public interest.[5]

At most, section 7 requires the Commission to make a determination as to whether a new technology or service is in the public interest. It does not, however, create a presumption that any particular company's application for spectrum to provide that new technology or service should be granted. To the extent that the Commission finds that a new service described in a

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[5] The legislative history on which M2Z relies in construing section 7 emphasized this limitation on the statute's scope: "[S]ection 7 ... is not intended ... to enable a particular person ... to obtain a license to provide a new technology or service if that person [is] otherwise precluded from doing so ... by the Communications Act of 1934, or by FCC rule or policy." 130 Cong. Rec. 334 (Jan. 24, 1984) (extended remarks of Rep. Dingell).

license application is in the public interest, nothing in section 7 precludes the Commission from deciding to establish rules for the provision of the new service and to hold an auction to determine who will obtain the spectrum allocated for that service.

The relief that M2Z seeks here is more akin to the sort of "pioneer's preference" that the FCC awarded to the developers of new services and technologies in the 1990s. A pioneer's preference permitted an innovator "to file a license application without being subject to competing applications," effectively guaranteeing a license to the preference recipient as long as it was "otherwise qualified." *Freeman Engineering,* 103 F.3d at 174 (internal quotations omitted). Congress terminated the pioneer's preference program in 1997. *See* 47 U.S.C. § 309(j)(13)(F). The decision to end pioneer's preferences reflected Congress's "assessment that the public interest is not served by granting a free license to an applicant on the basis of that applicant's significant contributions to the development of a new service or technology." *Order* at n.37 (JA 837). Insofar as M2Z seeks similar preferential treatment here, its request directly conflicts with Congress's determination that pioneer's preferences are not in the public interest.

Because the Commission found that a grant of M2Z's *application* was not in the public interest – primarily because it would have cut off consideration of alternative proposals and summarily deprived other companies of the ability to compete for this spectrum – section 7 is not relevant to this case.

B. The Commission Reasonably Determined That Even If Section 7 Applied Here, Granting M2Z's License Application Would Not Serve The Public Interest.

Even if section 7 created a presumption in favor of granting M2Z's application, and even if that application included a proposal for a new service or technology, *but see* Part III.C *infra,* it would still be of no help to M2Z because the Commission properly found that the public interest

would not be served by granting it an exclusive nationwide license. The agency noted that M2Z's construction benchmarks were "misleading as far as the actual extent of their coverage" and were "substantially less aggressive than the build-out requirements" that the agency had "imposed in other contexts ... to spur the deployment of advanced services to rural and underserved populations." *Order* ¶ 15 (JA 839-40). M2Z does not dispute that finding in its brief. Given the lethargic pace of construction under M2Z's proposal, the Commission reasonably found that "granting [M2Z's] application would prevent, rather than facilitate, widespread broadband deployment." *Ibid.* (JA 839).

The Commission also determined that granting M2Z's application could effectively impede the development of more cutting-edge broadband services. The agency anticipated that "technological advances" would only accelerate the transmission speed of broadband service "over time." *Order* ¶ 14 (JA 839). But the Commission found – and M2Z does not really dispute – that M2Z proposed to offer service at "relatively slow" transmission speeds that were "unremarkable" compared to existing broadband services. *Ibid.* In light of the "evolving nature" of broadband service, the Commission saw no good reason to grant an exclusive license to a company that proposed to offer broadband service at "relatively slow" and "unremarkable" transmission speeds. *Ibid.* Granting an exclusive nationwide license to M2Z would preclude use of the spectrum by other service providers that might offer higher-speed or more advanced broadband services.[6]

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[6] To qualify as a "basic broadband" service (as the FCC defined that term in a recent order), a service must provide transmission speeds at least equal to 768 kbps. *Development of Nationwide Broadband Data,* FCC 08-89, ¶ 20 n.66 (released June 12, 2008). Thus, the minimum speed for basic broadband service is twice as fast as the minimum speed of M2Z's proposed service (384 kbps). M2Z's proposal would only be designated a "first generation data" service under the FCC's recent order. *See ibid.*

Contrary to M2Z's assertion (Br. 47-52), the Commission properly found that M2Z's opponents met their burden under section 7(a) "to demonstrate that M2Z's proposal is inconsistent with the public interest." *Order* ¶ 16 (JA 841). Six parties applied for competing authorizations in the spectrum sought by M2Z. Those parties all proposed to offer service similar to M2Z. By proposing potential alternatives to M2Z's service, the six competing applicants convinced the Commission that the public interest would not be served by granting an exclusive license to M2Z and precluding consideration of all other license applications. *See Order* ¶¶ 9-11, 16 (JA 835-37, 840-41).[7]

In any event, what M2Z's opponents did or did not show is beside the point; as explained above, the Commission made its own determination that granting M2Z's application was not in the public interest. M2Z argues that section 7 does not permit the FCC to rule against the company if M2Z's opponents do not carry their burden of proof. Br. 47-49. This fanciful contention is refuted by the plain language of the statute, which directs "*[t]he Commission*," not private parties filing pleadings, to "determine whether any new technology or service ... is in the public interest." 47 U.S.C. § 157(b) (emphasis added). Moreover, under section 7, the burden of demonstrating that a proposal "is inconsistent with the public interest" applies only to entities "other than the Commission." 47 U.S.C. § 157(a). The FCC reasonably construed this statutory exception to mean that the agency could exercise its own expert judgment to determine that a section 7 proposal was not in the public interest, even if opponents of the proposal did not meet their evidentiary burden – indeed, even if the proposal had no opponents at all.

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[7] Section 7 makes no explicit provision for processing multiple proposals for new services for the same spectrum band simultaneously, leaving the Commission with discretion to address those proposals together and to find that all are novel so that none gets priority over the others. In this context, it makes no difference whether the agency finds that all are novel or none are; they are all equal.

C. The Commission Reasonably Found That Section 7 Did Not Apply To M2Z's Application.

M2Z's section 7 claim fails for a third independent reason. By its terms, section 7 applies only to petitions or applications that propose a "new technology or service." 47 U.S.C. § 157(b). The Commission reasonably found that M2Z's application did not propose any "new technology or service" within the scope of section 7. The service that M2Z proposed to provide – wireless broadband Internet access service – was already "being offered by other service providers." *Order* ¶ 13 (JA 838). Likewise, the technologies that M2Z proposed to use "are all proven technologies that have been deployed in other bands." *Ibid.*

M2Z contends that the Commission erred in concluding that M2Z's proposed service and technologies were not "new." Br. 34-46. But the company's various attacks on the agency's analysis of this issue are insubstantial.

1. *"New service."* M2Z proposed to provide a wireless broadband Internet access service. That type of service "currently is being offered by other service providers to consumers using both licensed and unlicensed spectrum." *Order* ¶ 13 (JA 838). Consequently, the Commission reasonably concluded that M2Z had not proposed a "new service" within the scope of section 7.

M2Z argues that the agency's assessment of M2Z's service "deviates without explanation from the Commission's earlier understanding" of the phrase "new service." Br. 36. According to M2Z, the FCC used that phrase in previous orders to describe "services that, like M2Z's proposal, have some familiar aspects but employ them in entirely new ways and with an entirely new scope." *Ibid.* As M2Z concedes, however, none of those prior orders construed the phrase "new service" in the context of applying section 7. *See* Br. 37 n.31. M2Z fails to cite a single

order where the Commission previously interpreted section 7 to apply to a service comparable to M2Z's proposal.

To qualify for consideration under section 7, M2Z must do more than just propose to offer an existing service in a new way or on a broader scale.[8] As the Commission explained when it adopted a "pioneer's preference" program in the 1990s, a modification of an existing service can produce the sort of "new" or innovative service contemplated by section 7 only if the change results in "a substantial enhancement" of the existing service, such as "an added functionality, a different use of the spectrum than previously available, or a change in the [service's] operating or technical characteristics." *Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services,* 6 FCC Rcd 3488, 3494 (¶¶ 47-48) (1991) ("*Pioneer's Preference Order*"). M2Z has not shown that its proposal would lead to any such "substantial enhancement" in wireless broadband Internet access service.

M2Z claims that the Commission's definition of "new service" under section 7 is more "restrictive" than Congress intended. Br. 38. But Congress did not express a clear intent concerning the meaning of "new service." The statute does not define that ambiguous phrase. And while M2Z asserts that a "layman ... would have no trouble concluding that M2Z's service is 'new'" (Br. 38), Congress gave no indication that it intended for the FCC to adopt a layman's understanding of the concept of "new service." Such an approach would make little sense. A layman with only general knowledge of the communications industry would be unable to make

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[8] *See, e.g., TelQuest Ventures, LLC,* 16 FCC Rcd 15026, 15037 (¶ 30) (2001) (a proposal to offer "an additional DBS service option" did not qualify as a "new service" under section 7); *Southwestern Bell Telephone Co. Revisions to Tariff FCC No. 6,* 6 FCC Rcd 3760, 3764 (¶ 31) (1991) (the reference to "new technology or service" in section 7(b) "cannot be interpreted to endorse methods for the provision of existing services at additional locations").

an informed judgment about whether a specific service was sufficiently innovative to be considered "new" under section 7.

The FCC – the expert agency entrusted with regulating communications services – is in the best position to determine whether a proposed service is "new." Applying its expertise here, the Commission reasonably concluded that for purposes of section 7, M2Z's proposed service was not "new." Because "the subject matter" addressed by section 7 "is technical, complex, and dynamic," the FCC's reasonable interpretation of that ambiguous statute is entitled to substantial deference. *See National Cable & Telecommunications Association v. Gulf Power Co.,* 534 U.S. 327, 339 (2002).

M2Z asserts that it would be "nearly impossible for any service to fall within Section 7" under the FCC's interpretation of "new service" in this case. Br. 39. That claim is unfounded. The Commission here simply found that M2Z's wireless broadband Internet access service was not "new" because other providers were already offering the same type of service. That finding was fully justified. The Commission's reasonable refusal to apply section 7 to M2Z's proposed service will not foreclose the proper application of section 7 to future proposals that involve genuinely "new" services.[9]

M2Z also maintains that the Commission unreasonably interpreted the phrase "new service" in this case "by ignoring all details of M2Z's service and characterizing it in the most general terms." Br. 39. But the Commission did not ignore the details of M2Z's proposal. In

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[9] M2Z speculates that such innovative services as high-definition television (HDTV) and digital personal communications service (PCS) would not qualify as "new" under the FCC's reading of section 7. Br. 39. There is no basis for such speculation. HDTV and digital PCS are very different from the service proposed by M2Z. Those services made substantial technological enhancements to existing services. *Cf. Pioneer's Preference Order,* 6 FCC Rcd at 3494 (¶ 47) (an applicant may qualify for a pioneer's preference if its proposal leads to "a substantial enhancement of an existing service"). By contrast, M2Z failed to show that its proposal would lead to any significant technological enhancement of existing service.

particular, it noted "the relatively slow speed of M2Z's proposed broadband service." *Order* ¶ 14 (JA 838). The Commission reasonably concluded that the proposed service was not "new" because "the transmission speeds proposed by M2Z are unremarkable compared to other broadband services currently being deployed." *Ibid.* (JA 839).

M2Z asserts that it is "not intuitively apparent ... why the speed of M2Z's service ... has any bearing on whether the service is *new*." Br. 41. As the Supreme Court has recognized, however, the primary innovative feature of broadband service is its speed. Broadband services provide Internet access and transmit data at much higher speeds than traditional "dial-up" connections. *See Brand X,* 545 U.S. at 974-75. Now that such high-speed services are widely available, the Commission reasonably found that there was nothing especially "new" about M2Z's proposal to offer a broadband service with slower transmission speeds than existing broadband services.

2. *"New technology."* The Commission found that the technologies that M2Z proposed to use – TDD, AAS, and OFDMA – "are all proven technologies that have been deployed in other bands." *Order* ¶ 13 (JA 838). Consequently, the Commission reasonably concluded that M2Z had not proposed a "new technology" within the scope of section 7.

M2Z does not dispute that two of the technologies it plans to use – TDD and AAS – are not new. Indeed, in its application, M2Z acknowledges that these technologies are currently in use. *See* M2Z Application at 14, 21 (JA 231, 238) (cited in *Order* at n.43 (JA 838)).

M2Z challenges the Commission's finding that OFDMA is not a new technology. Br. 42-45. But the record shows – and M2Z does not appear to dispute – that providers of wireless broadband service are currently using orthogonal frequency division multiplexing (OFDM) technology. *See* NetfreeUS Reply to M2Z Consolidated Opposition to Petitions to Deny at 3 (JA

736). Although M2Z contends that "OFDM and OFDMA are not the same" (Br. 43), the article on which it bases that assertion describes OFDM and OFDMA as "two different variants of the same technology."[10] That article also notes that Adaptix has deployed a "second-generation" OFDMA product line in Asia. Thus, far from supporting M2Z's section 7 claim, the article confirms that OFDMA is not a new technology.

M2Z also asserts that its proposed combination of OFDMA, TDD, and AAS technologies is "new and innovative." Br. 45. As the Commission has previously found, however, a proposal based on a combination of existing technologies "is not innovative" if it fails to produce "a significant enhancement of existing services." *Amendment of the Commission's Rules to Establish New Personal Communications Services,* 9 FCC Rcd 1337, 1350 (¶ 88) (1994). M2Z has not shown that its combination of technologies will yield any significant enhancement of wireless broadband service.

M2Z claims to have "submitted several rounds of expert evidence on the question." Br. 45. In its brief, however, M2Z cites only one piece of "expert evidence" on the subject: a declaration in which M2Z's "Senior Technology Adviser" opines – without further explanation – that M2Z's proposed combination of technologies "will provide significant improvement in spectral efficiencies and network capacity." Kolodzy Declaration at 7 (JA 822). That sort of bald assertion cannot suffice to demonstrate that M2Z's proposed use of existing technologies is "new."

In any event, substantial record evidence supported the FCC's determination that M2Z's proposal did not involve any "new technology" within the scope of section 7. Several parties strongly contested M2Z's claim that its proposed use of existing technologies was "new" or

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[10] *See* Kevin Fitchard, *OFDMA Prepares to Move On*, Telephony Online, April 1, 2006, http://www.telephonyonline.com/mag/telecom_ofdma_prepares_move/index.html.

novel.[11] And even M2Z itself seemed to discount the technological novelty of its proposal. At one point, M2Z asserted that its proposal was pioneering only "in economic terms," and that its application sought "no preferential treatment on the basis of the technology that [it] proposes to deploy." M2Z Consolidated Opposition to Petitions to Deny at 70 (JA 658). This record evidence corroborated the Commission's expert technical assessment that M2Z did not propose any new service or technology covered by section 7.

The Commission's judgment on matters within its "technical expertise" is entitled to "an extra measure of deference." *EarthLink,* 462 F.3d at 9 (internal quotations omitted). Absent "highly persuasive evidence to the contrary," the Commission's "technical judgment" on an issue should be upheld if it "is supported with even a modicum of reasoned analysis." *Mobile Relay Associates,* 457 F.3d at 8 (internal quotations omitted). Under this highly deferential

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[11] *See* NetfreeUS Reply to M2Z Consolidated Opposition to Petitions to Deny at 3-4 (JA 736-37) (providers of wireless broadband services "already are providing service using ... the same technologies M2Z characterizes as novel. ... To the extent that M2Z proposes technology that is already deployed elsewhere or is merely a variation of deployed technologies, M2Z does not propose a 'new' technology for purposes of Section 7(b)."); CTIA Reply to M2Z Consolidated Opposition to Petitions to Deny at 13 (JA 761) ("M2Z's proposed service and technology are clearly not new or novel in any way, and certainly do not rise to the level of the new services and technologies contemplated by Section 7."); Verizon Wireless Reply to M2Z Consolidated Opposition to Petitions to Deny at 4 (JA 779) (M2Z's proposal "cannot possibly qualify as an innovative new service or technology as intended by Section 7").

standard, the Court should affirm the Commission's reasonable conclusion that M2Z did not propose a new service or technology.[12]

IV. THE COMMISSION REASONABLY CONCLUDED THAT AVOIDING MUTUAL EXCLUSIVITY IN THIS CASE WOULD NOT SERVE THE PUBLIC INTEREST.

When the FCC accepts mutually exclusive applications for a license, section 309(j) requires the Commission to grant the license "to a qualified applicant through a system of competitive bidding." 47 U.S.C. § 309(j)(1). For the vast majority of terrestrial commercial wireless services, the Commission accepts competing applications for licenses and awards the available licenses via auctions. Nonetheless, section 309(j) may not "be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings." 47 U.S.C. § 309(j)(6)(E).

On the basis of the record in this proceeding, the Commission found no public interest justification for avoiding mutual exclusivity here. Although it left open the possibility that it might reach a different conclusion once it held a rulemaking and compiled "a more complete record," the Commission concluded that the record "at this point" did not justify a departure

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[12] There is also no merit to M2Z's contention (Br. 50-51) that the Commission failed to rule on M2Z's section 7 claim within the one-year timeframe prescribed by the statute. M2Z first invoked section 7 in its September 2006 forbearance petition; its original license application did not even mention section 7. The Commission addressed the section 7 issue within a year after the forbearance petition was filed, thus timely discharging any duty it had. *See Order* ¶ 17 (JA 841-42). In any event, now that the Commission has ruled on the section 7 issue, M2Z's complaint about the timing of the agency's action is moot. *See Gottlieb v. Pena,* 41 F.3d 730, 733 (D.C. Cir. 1994) ("where Congress has placed an agency under a legal obligation to render a decision within a stated time period but has not set forth the consequences of exceeding that period, ordinarily the time period is directory rather than mandatory," and the agency's failure to comply with the deadline does not vitiate its subsequent action) (internal quotations omitted).

from the agency's usual practice of conducting an auction among mutually exclusive applicants. *Order* ¶ 11 (JA 837).

M2Z contends that the FCC in this case failed to satisfy its obligation under section 309(j)(6)(E) to consider whether avoiding mutual exclusivity would serve the public interest. Br. 55-58. That claim is baseless.

As this Court has observed, section 309(j)(6)(E) is merely "a hortatory provision." *Northpoint Technology, Ltd. v. FCC,* 414 F.3d 61, 74 (D.C. Cir. 2005). That provision does not substantially limit the FCC's discretion. It does not "forbid resort to competitive bidding unless no other means to resolve mutual exclusivity are available." *Bachow Communications, Inc. v. FCC,* 237 F.3d 683, 691 (D.C. Cir. 2001). Nor does it "direct the FCC to adopt *all* other means available" to avoid mutual exclusivity. *Orion Communications Ltd. v. FCC,* 213 F.3d 761, 763 (D.C. Cir.2000). Section 309(j)(6)(E) "imposes an obligation only to minimize mutual exclusivity in the public interest ... within the framework of existing policies." *Benkelman Telephone Co. v. FCC,* 220 F.3d 601, 606 (D.C. Cir. 2000) (internal quotations omitted).

Section 309(j)(6)(E) gives the Commission broad discretion as to how to make and implement the public interest determination that M2Z seeks. And the statute specifically refers to the use of service regulations to avoid mutual exclusivity – precisely the course that the Commission is considering in its pending rulemaking. To be sure, the Commission in the *Order* found that the public interest is usually best served by accepting mutually exclusive applications and conducting auctions, *Order* ¶ 10 (JA 836), and that the record in this case did not compel a different result. *Order* ¶ 11 (JA 837). Nonetheless, contrary to the implications of M2Z's brief, the Commission is considering in the pending rulemaking whether to adopt service rules that avoid mutual exclusivity. *See NPRM* ¶ 3 (SA 3-4). If M2Z thinks that the rulemaking order that

the agency ultimately adopts is inconsistent with section 309(j)(6)(E), the company can seek review of that order. In this case, however, the Commission has certainly not violated section 309(j)(6)(E) by following one of the procedural courses that the statute permits.

M2Z claims that the FCC ignored all of the record evidence regarding the public interest benefits of M2Z's service. Br. 53-55. But M2Z fails to identify any evidence that directly addressed the relevant public interest question here: Would the summary award of a free exclusive license to M2Z clearly serve the public interest better than the consideration of alternatives in a rulemaking proceeding? After reviewing all of the record evidence, the Commission reasonably concluded that it could not answer that question in the affirmative. Accordingly, it declined to adopt M2Z's proposal, which would have foreclosed any possibility of conducting an auction.

M2Z asserts that the *Order* reflected a "predisposition" to use competitive bidding to award spectrum licenses. Br. 52-53, 55. To the contrary, as noted above, the *Order* expressly left open the possibility that the Commission might "conclude, after compiling a more complete record through the APA notice-and-comment rulemaking process, that the public interest would be better served by employing an alternative licensing framework" for the 2155-2175 MHz band. *Order* ¶ 11 (JA 837). Indeed, in the subsequent *NPRM*, the Commission requested comment on whether it "should consider licensing this spectrum in a manner that would avoid the filing of mutually exclusive applications, and accordingly allow licensing on a non-auctioned basis." *NPRM* ¶ 3 (SA 4). The Commission simply concluded in the *Order* that it could not justify such an alternative approach on the basis of the record in this proceeding. *Order* ¶ 11 (JA 837). That conclusion was entirely reasonable.

If anyone has a "predisposition" in this case, it is M2Z. The company possesses the unshakeable conviction that it is entitled to a free, exclusive, nationwide license – regardless of the possibility that other potential users might employ the spectrum more efficiently, and notwithstanding the likelihood that an auction would better ensure the "recovery for the public of a portion of the value" of the spectrum. *See* 47 U.S.C. § 309(j)(3)(C). Unlike M2Z, the Commission rightly refused to blind itself to these important considerations.

* * *

Ultimately, although M2Z's attacks on the *Order* take various forms, they all revolve around a common theme. Whether M2Z invokes section 10 or section 7 or section 309, the company is essentially arguing that the FCC did not properly assess the public interest when it dismissed M2Z's application and opted instead to conduct a rulemaking where it could conduct a more thorough inquiry into the public interest and establish service rules for the spectrum at issue. That claim is unavailing.

The courts have "repeatedly emphasized that the Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference." *WNCN Listeners Guild,* 450 U.S. at 596. "In making a public interest judgment under the Communications Act, the Commission is exercising both its congressionally-delegated power and its expertise; it clearly enjoys broad deference on issues of both fact and policy." *Syracuse Peace Council v. FCC,* 867 F.2d 654, 658 (D.C. Cir. 1989). The FCC's assessment of the public interest in this case fell comfortably within the agency's broad discretion.

The Commission reasonably found that it lacked a sufficient record in this proceeding to justify the dramatic departure from standard licensing procedures that M2Z proposed. Rather than make an overly hasty and ill-advised decision to grant M2Z a free, exclusive, nationwide

license, the Commission commenced a rulemaking so that it could develop a more substantial record for evaluating the appropriate allocation of the 2155-2175 MHz band. The Commission reasonably determined that this sensible and carefully considered approach would best serve the public interest.

"The Commission's implementation of the public-interest standard" in this case was properly "based on a rational weighing of competing policies." *See WNCN Listeners Guild,* 450 U.S. at 596. The Commission reasonably decided that the benefits of conducting a rulemaking to assess how the spectrum should be used – and whether it should be auctioned – "outweigh[ed] the value of any purported public interest benefits of providing M2Z ... with a route to licensing that ... precludes even the possibility of an auction and would simply give [M2Z] spectrum for free." *Order* ¶ 11 (JA 837).

The Commission has broad discretion under the APA to choose between rulemaking and adjudication. *See NLRB v. Bell Aerospace Co.,* 416 U.S. 267, 294 (1974). The Communications Act also gives the FCC wide latitude to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." 47 U.S.C. § 154(j); *see also FCC v. Schreiber,* 381 U.S. 279, 289-90 (1965); *FCC v. Pottsville Broadcasting Co.,* 309 U.S. 134, 138, 143 (1940). Moreover, this Court has repeatedly recognized that "sound regulation has procedural as well as substantive elements, and that the public interest ... comprehends both." *Comuni-Centre Broadcasting, Inc. v. FCC,* 856 F.2d 1551, 1555 n.29 (D.C. Cir. 1988) (quoting *Valley Telecasting Co. v. FCC,* 336 F.2d 914, 917 (D.C. Cir. 1964)). The agency reasonably exercised its broad procedural discretion here in a manner consistent with the public interest. M2Z has not shown otherwise.

Indeed, the wisdom of the Commission's approach has already been demonstrated. In its original application, M2Z proposed that its wireless network provide "data rates of at least 384 kbps down[stream]." M2Z Application at 22 (JA 239). Now that M2Z is participating in a proceeding where competing proposals are on the table and potential competitors may be able to obtain this spectrum, it has pledged to provide service that is twice as fast. In an ex parte submission filed with the Commission three days before it filed its brief in this Court, M2Z said that the Commission "should require" service in the 2155-2175 MHz band "to be provided at downstream speeds of at least 768 kbps." Letter from Uzoma Onyeije, M2Z, to Marlene Dortch, FCC, WT Docket No. 07-195, May 5, 2008, at 4 (SA 130). Had the Commission immediately and reflexively granted M2Z's previous proposal, as the company demanded, the public would have been stuck with service that M2Z itself now implicitly acknowledges is unacceptably slow. For this reason and many others, the Commission was right to conduct a thorough proceeding and weigh all its options for this valuable spectrum rather than rushing to adopt the first proposal to come through the door.[13]

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[13] M2Z asks the Court to order the FCC to dismiss the pending rulemaking. Br. 58-59. That remedy lies far beyond the scope of this case. The Court here has jurisdiction to review the *Order* issued in this proceeding – *not* to suspend or dismiss a rulemaking that the FCC commenced *in a separate proceeding.* M2Z also asks the Court to direct the FCC to grant M2Z's application. Br. 60. Even assuming that any of M2Z's claims had merit – and none do – the remedy requested by M2Z is inappropriate. As the Supreme Court long ago observed, "the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the Commission for reconsideration." *FPC v. Idaho Power Co.,* 344 U.S. 17, 20 (1952). In particular, "a court may not compel an administrative agency to pursue a particular course of action when another is open to it." *Public Service Commission v. FPC,* 543 F.2d 757, 834 n.42 (D.C. Cir. 1974).

CONCLUSION

For the foregoing reasons, the Court should deny M2Z's petition for review and affirm the Commission's *Order*.

Respectfully submitted,

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June 23, 2008

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

M2Z NETWORKS, INC., Appellant/Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, Appellee/Respondents.	)	NOS. 07-1360 & 07-1441

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Appellee/Respondents" in the captioned case contains 13968 words.

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August 12, 2008

STATUTORY APPENDIX

47 U.S.C. § 405

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5--WIRE OR RADIO COMMUNICATION
SUBCHAPTER IV--PROCEDURAL AND ADMINISTRATIVE PROVISIONS

§ 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order.

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided,* That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

47 U.S.C. § 405 (continued)

(b)(1) Within 90 days after receiving a petition for reconsideration of an order concluding a hearing under section 204(a) of this title or concluding an investigation under section 208(b) of this title, the Commission shall issue an order granting or denying such petition.

(2) Any order issued under paragraph (1) shall be a final order and may be appealed under section 402(a) of this title.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

M2Z Networks, Inc., Appellant/Petitioner,

v.

Federal Communications Commission and USA, Appellee/Respondents.

Certificate Of Service

I, Sharon D. Freeman, hereby certify that the foregoing printed "Brief For Appellee/Respondents" was served this 12th day of August, 2008, by mailing true copies thereof, postage prepaid, to the following persons at the addresses listed below:

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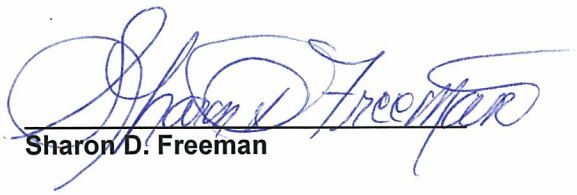

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